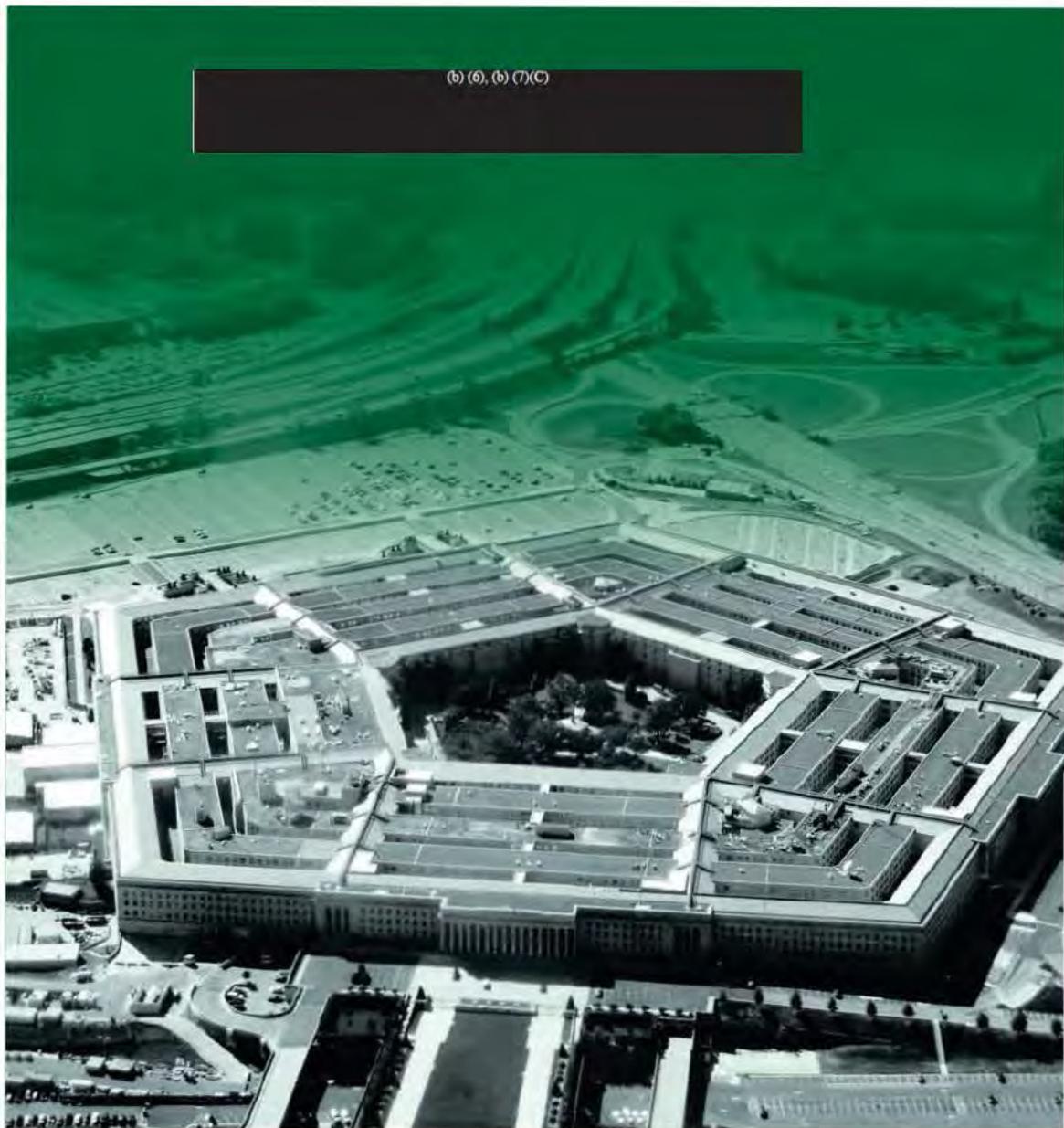


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# INSPECTOR GENERAL

*U.S. Department of Defense*

December 29, 2014



INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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**WHISTLEBLOWER REPRISAL INVESTIGATION**  
**HEADQUARTERS, SPECIAL OPERATIONS COMMAND, AFRICA**  
**STUTTGART, GERMANY**

**I. EXECUTIVE SUMMARY**

We conducted this investigation in response to allegations that

[REDACTED] Special Operations Command Africa (SOCAFRICA), Stuttgart, Germany, was subjected to reprisal via: 1) a lowered annual performance evaluation, 2) denial of training seminar, 3) denial of a performance award, 4) a reassignment, and 5) a proposed disciplinary action for being perceived to have made two anonymous IG complaints, communications to an investigating officer (IO), communication to an IG, communication to the Department of Defense (DoD) Hotline, and cooperation with a Department of Defense Inspector General (DoD IG) investigation.

We substantiated allegations #1, #3 and #5. We did not substantiate allegations #2 and #4 above.

We found Complainant made and was perceived to have made disclosures protected by statute. We determined a lowered annual performance evaluation, denial of a performance award, and proposed disciplinary action were personnel actions that would not have occurred absent the protected disclosures. We determined the reassignment was a personnel action that would have occurred absent the protected disclosures. We determined the training seminar could not have reasonably been expected to lead to a promotion or performance evaluation; accordingly the denial of said training was not analyzed for reprisal.

We conclude the following responsible management officials (RMOs) did reprise against Complainant by taking actions inconsistent with the principles of Title 5, United States Code, Section 2302 (5 U.S.C. 2302):

Rear Admiral (RDML) Brian L. Losey, U.S. Navy (USN), Commander, SOCAFRICA;<sup>1</sup>

[REDACTED]

SOCAFRICA.

<sup>1</sup> All titles and ranks identified pertain to the position(s) held at the time the incident took place and do not necessarily reflect an individual's current rank or title.

By letter dated October 21, 2014, we provided RDML Losey and (b)(6), (b)(7)(C) the opportunity to comment on a preliminary report of investigation.

In RDML Losey's response dated November 7, 2014, he took exception to what he stated was significant bias and partiality in the investigation, stated that DoD IG's investigative methodology was to take the dimmest possible view of every action taken by RMOs, to minimize duty and Command obligations, diminish or suppress evidence supporting RMO actions, disregard motives of complainant and witness misconduct, and present complainant assertions as fact. We carefully considered RDML Losey's response, however, we did not alter our original conclusion.

In (b)(6), (b)(7)(C) response dated November 19, 2014, he acknowledged being aware of protected disclosures "by late Fall 2011," but that he did not suspect Complainant had filed a complaint until December 2012. (b)(6), (b)(7)(C) stated that Complainant's personnel actions were a result of Complainant's incompetence and misconduct. We carefully considered (b)(6), (b)(7)(C) response, however, we did not alter our original conclusion.<sup>2</sup>

We recommend the Secretary of the Navy take appropriate action against RDML Losey for reprising against Complainant.

We recommend the Secretary (b)(6), (b)(7)(C) take appropriate action against (b)(6), (b)(7)(C) for reprising against Complainant.

We recommend the Secretary (b)(6), (b)(7)(C) replace the Complainant's 2012 annual performance evaluation with the rating supplied by his original rater, and grant him the commensurate performance award for 2012.

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<sup>2</sup> While we have included what we believe is a reasonable synopsis of RDML Losey's and (b)(6), (b)(7)(C) responses, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated RDML Losey's and (b)(6), (b)(7)(C) comments where appropriate throughout the report and provided a copy of each of their responses to the cognizant management officials together with this report.

## II. BACKGROUND

(b)(6), (b)(7)(C)

The RMOs served at SOCAFRICA as follows:

RDML Losey, Commander, June 21, 2011, to June 7, 2013;

(b)(6), (b)(7)(C)

; and

(b)(6), (b)(7)(C)

Complainant alleged the RMOs administered personnel actions in reprisal for his perceived and actual protected disclosures.

## III. SCOPE

The investigation covered the period from the first anonymous IG complaint on July 13, 2011, to Complainant's proposed disciplinary action on March 8, 2013. The investigation included interviews of Complainant, RMOs, 28 witnesses, Human Resources personnel, and Agency officials. In addition, we reviewed Agency-provided information, email personal storage tables, memoranda for record, and comparator information.

## IV. STATUTORY AUTHORITY

The Department of Defense Inspector General (DoD IG) conducts whistleblower reprisal investigations involving civilian appropriated fund employees of the Department and applicants under Section 7(a) and 8(c)(2) of "The Inspector General Act of 1978," as amended. Further, under DoD Directive 5106.01, "Inspector General of the Department of Defense," DoD IG receives and investigates such complaints of reprisal generally in accordance with Title 5, United States Code, Section 2302.

## V. FINDINGS AND ANALYSIS

### A.1. Did Complainant make a protected disclosure? Yes.

Complainant was perceived as making the July 13, 2011, complaint to the DoD Hotline described below. Although Complainant was not actually the source of the Hotline complaint, an appropriated fund civilian is protected from reprisal for a disclosure he is perceived of making, as long as the disclosure at issue would be protected under the statute.

*July 13, 2011, DoD Hotline Complaint*

(b)(6), (b)(7)(C)

On July 13, 2011, an anonymous person (b)(6), (b)(7)(C) filed a DoD Hotline complaint alleging that RDML Losey (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C) DoD IG referred the complaint to the Naval Inspector General (NAVINSGEN) on September 16, 2011. NAVINSGEN questioned RDML Losey in late September 2011 (b)(6), (b)(7)(C) and determined that the July 13, 2011, complaint lacked merit. The case was closed on September 27, 2011, and NAVINSGEN notified RDML Losey on September 28, 2011, that the case was closed.

Complainant reported having many conversations about the IG complaint with RDML Losey from late September through early November 2011. Complainant testified RDML Losey stated he was determined to find out who made the IG complaint, having narrowed it down to three people he suspected. Complainant stated that RDML Losey perceived the source of the IG complaint to be (b)(6), (b)(7)(C) SOCAFRICA; or a third person RDML Losey would not name.

(b)(6), (b)(7)(C), stated he and RDML Losey (prior to November 4, 2011) met to discuss a recent SOCAF inspection conducted by Special Operations Command (SOCOM). (b)(6), (b)(7)(C) stated that during the meeting, RDML Losey was “frustrated and felt that members of his command were disloyal to him, and that they should have addressed any concerns directly with him rather than through Inspector General channels.” As a result, (b)(6), (b)(7)(C) sought more information about the status of the IG complaint, and on November 4, 2011, emailed RDML Losey stating:

Sir, I checked on the DoD IG complaint you mentioned in our recent meeting. The complaint was anonymously submitted to the DoD Hotline. The investigation was closed in late September 2011, and the allegations were not substantiated. No further action is being taken.

Further, he advised RDML Losey that complaints against senior officials are common and not to engage in reprisals because of such a complaint. RDML Losey replied, "Roger appreciate the insights and will follow the advice."

RDML Losey did not understand why someone in his command would file a complaint against him (b)(6), (b)(7)(C). RDML Losey testified that he discussed this issue with his front office and wondered why someone would not come to him first instead of filing a complaint. RDML Losey testified that he could not understand why someone would not just say:

'Hey, boss, did you know that you're not entitled to this ... It's like, I don't understand. Why didn't somebody just fess up to it?'

(b)(6), (b)(7)(C), I said [to Complainant], 'Why didn't you tell me?' And then we engaged in a speculative discussion of, you know, only three officers knew, (b)(6), (b)(7)(C)

According to Complainant, after they had already had numerous conversations about the IG complaint, RDML Losey asked him his opinion on who he thought would have made the complaint and discussed a list of possibilities.

Complainant stated RDML Losey suspected (b)(6), (b)(7)(C). Complainant assured RDML Losey he knew (b)(6), (b)(7)(C), SOCAFRICA), had not made the anonymous complaint. RDML Losey told Complainant to talk to them to find out if they made the complaint. Complainant also testified that the topic of who filed the complaint was discussed repeatedly over the course of 3 months, including an instance approximately the last week of October 2011 in which RDML Losey told him again that he knew it was either (b)(6), (b)(7)(C), or a third person, and that he (RDML Losey) would "find out who did it" and "cut the head off this snake and we'll end this." Complainant stated [RDML Losey] said very clearly after mentioning (b)(6), (b)(7)(C) was the second person, "There is a third, but I won't discuss that with you." Complainant said RDML Losey never made it clear that [Complainant] was [a suspect], just that he said, "There's a third person, that's anonymous." Complainant reiterated that he had talked to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C), and it was neither of them.

On October 24 and 29, 2011, RDML Losey called (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) into his office and discussed the IG complaint. (b)(6), (b)(7)(C) testified he told RDML Losey "Sir, I had absolutely nothing to do with this" and that (b)(6), (b)(7)(C) "would never submit an IG complaint against you," but that RDML Losey was convinced someone from (b)(6), (b)(7)(C) was responsible. (b)(6), (b)(7)(C) wrote a memorandum for record (MFR) on October 24, 2011, which stated:

On Monday morning at 0745 prior to his travel on Navy business ... He mentioned the IG complaint that had been filed against him alleging (b)(6), (b)(7)(C) ... He said that he'd narrowed it down to 3 people who could have submitted it. He said, 'I'll find out who did it.'

(b)(6), (b)(7)(C) denied ever hearing RDML Losey say he had "narrowed it down to three people and was determined to find out who did it" and did not recall the October 24 and 29, 2011, meetings in RDML Losey's office with (b)(6), (b)(7)(C). When asked if he ever heard RDML Losey say he suspected someone of making the complaint, (b)(6), (b)(7)(C) testified:

I did ... well, and he didn't suspect so much as he said, 'Who would have done this?' and he rattled off a couple of names. I think he mentioned (b)(6), (b)(7)(C), and he mentioned (b)(6), (b)(7)(C) that might have lodged the complaint.

When asked about the IG complaint involving (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) stated RDML Losey told him someone from the command lodged the complaint and that RDML Losey referred to a group of SOCAFRICA civilians, including Complainant, (b)(6), (b)(7)(C), as " ... somebody within that group would probably be somebody that would do that complaint."

(b)(6), (b)(7)(C), SOCAFRICA, (b)(6), (b)(7)(C), testified that after being told by Complainant and (b)(6), (b)(7)(C) that RDML Losey had "narrowed it down to three people and ... he was going to figure out who complained and cut the head off," he recommended to the (b)(6), (b)(7)(C), around the last week of October or first week of November 2011, that he advise RDML Losey to "tone it down and be very careful about the appearance of reprisal." (b)(6), (b)(7)(C) documented that conversation on November 4, 2011, in an MFR.

(b)(6), (b)(7)(C) testified that RDML Losey brought up the IG complaint, telling (b)(6), (b)(7)(C) the "IG complaint was malicious." (b)(6), (b)(7)(C) testified about this discussion as follows:

I remember saying, 'Brian [RDML Losey], you can't say out loud that using the IG system is malicious. You can't say that.' That was right around that same time, of the first week in November.

Yeah, yeah, yeah, because he didn't think I was supporting him in terms of some other things that were happening, and I was doing my best. I was trying to get him some more options on some issues, and he just thought I wasn't supporting him and he wanted to talk to me about it. But when I said, 'Brian, you can't use, I

don't think the IG would appreciate it if you said using their system was malicious.' And he kind of laughed. He goes, 'Yeah, I know, but it was malicious, (b)(6), (b)(7)(C) I thought okay, he didn't get it, then. He's not listening to me.

I was really surprised that RDML Losey got so hot on it. ... So I was kind of surprised when this — I thought this complaint came up that RDML Losey reacted so strongly to it. I thought that was part of GO Indoc [General Officer Indoctrination] that said, 'Hey, you're going to get IG complaints. Handle it.'

A preponderance of the evidence indicates that RDML Losey was trying to determine who made the complaint and that he perceived a group of civilians, including Complainant, as having made the DoD Hotline complaint regarding (b)(6), (b)(7)(C).

*November 17, 2011, AFRICOM IG Complaint*

On November 17, 2011, the AFRICOM IG emailed RDML Losey notifying him that they had received an anonymous letter requesting an assessment of a "toxic" SOCAFRICA command climate. Complainant stated RDML Losey was livid after receiving the complaint, and he called him into his office and told him to deliver a message to "the locker room" and tell them to:

play nice and wait until I'm gone. Smile. Act like you're going to work. ... but if you continue to undermine my authority as a commander, I'm going to bury each one of them. I'm going to come after them and I'm going to [make] it very unpleasant.

(b)(6), (b)(7)(C)

Complainant stated RDML Losey went on to say he was not sure where Complainant's loyalties lay and that he was conniving.

We were unable to corroborate whether RDML Losey used the term "locker room" as this was a one-on-one conversation between him and Complainant; however, according to SOCAFRICA civilian employees we interviewed, Complainant discussed with them RDML Losey's belief of a "locker room" conspiracy.

A preponderance of the evidence indicates that RDML Losey was trying to determine who made the complaint and that he perceived a group of civilians, including Complainant, of making the November 17, 2011, AFRICOM IG complaint.

*December 16, 2011, Communication to IO, Command Directed Investigation (CDI,*

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)<sup>3</sup> On December 16, 2011, (b) (6), (b) (7)(C) appointed (b) (6), (b) (7)(C) as IO to conduct a CDI into the facts and circumstances concerning (b) (6), (b) (7)(C). On January 4, 2012, Complainant provided a sworn statement to the IO. Complainant's statement contained information including but not limited to his duty title, his knowledge of SOCAFRICA (b) (6), (b) (7)(C), his favorable characterization of (b) (6), (b) (7)(C), and general information about RDML Losey's management style. Complainant did not disclose information concerning a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Accordingly, Complainant's communication to the IO is not a protected disclosure.

*August 28, 2012, Communication to AFRICOM IG*

On August 28, 2012, Complainant had a discussion with (b) (6), (b) (7)(C) concerning Complainant's desire for a Standard Form 50 documenting his move to (b) (6), (b) (7)(C). Complainant did not disclose information concerning a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Accordingly, Complainant's communication to the IG is not a protected disclosure.

*September 23, 2012, Communication to DoD Hotline*

On September 23, 2012, Complainant filed a DoD Hotline complaint alleging that RDML Losey and (b) (6), (b) (7)(C) took or directed personnel actions in reprisal for Complainant's perceived and protected disclosures. Complainant's DoD Hotline complaint contained reprisal allegations that are violations of law; accordingly, it is a protected disclosure.

**A.2. Did Complainant cooperate with or disclose information to the Inspector General of an agency? Yes.**

*February 22, 2012, Cooperation with DoD IG (b) (6), (b) (7)(C)*

On February 22, 2012, Complainant provided a sworn statement to an IO in the DoD IG investigation of (b) (6), (b) (7)(C). Complainant's statement constituted cooperation with the Inspector General of an agency. Accordingly, Complainant's cooperation is protected.

<sup>3</sup> (b) (6), (b) (7)(C)

**B. Was Complainant the subject of an actual, threatened, or recommended personnel action? Yes**

*Lowered Annual Performance Evaluation - Yes*

(b)(6), (b)(7)(C), as rater, assigned Complainant a rating of “Excellence 75% or More [Objective]” for the performance period of June 22, 2011, to June 30, 2012, and submitted the performance evaluation to RDML Losey. On September 10, 2012, RDML Losey, as senior rater, administered Complainant a “Successful (3 block)” rating and lowered (b)(6), (b)(7)(C) rating from “Excellence 75% or More [Objective]” to “Success All or Excellence.” A performance evaluation is a personnel action.

*Denial of Training Seminar - No*

On September 14, 2012, (b)(6), (b)(7)(C) canceled Complainant’s attendance at (b)(6), (b)(7)(C) seminar. The denial of an education or training seminar is a personnel action if training attendance could reasonably be expected to lead to a promotion or performance evaluation. WRI found the training seminar was a normal work group meeting that would have allowed Complainant to network with (b)(6), (b)(7)(C). However, WRI did not find Complainant’s attendance at the training seminar could have reasonably led to a performance evaluation or a promotion (b)(6), (b)(7)(C). Accordingly, we did not further review the training denial for reprisal.

*Denial of Performance Award - Yes*

On September 18, 2012, (b)(6), (b)(7)(C) denied Complainant a performance award for the June 22, 2011, to June 30, 2012, civilian appraisal period. A decision concerning pay, benefits, or awards is a personnel action.

*Reassignment - Yes*

On November 1, 2012, (b)(6), (b)(7)(C), at the direction of RDML Losey, reassigned Complainant to (b)(6), (b)(7)(C). A reassignment is a personnel action.

Although Complainant was reassigned in November, Complainant had known of the impending reassignment since January 16, 2012, when (b)(6), (b)(7)(C) told Complainant he would be moving to (b)(6), (b)(7)(C) within 2 weeks. However, SOCAFRICA did not find Complainant’s replacement until (b)(6), (b)(7)(C), delaying Complainant’s move. During the first week of April 2012, as he prepared to transition to (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) asked Complainant to assist (b)(6), (b)(7)(C) with command administrative duties in lieu of moving immediately to (b)(6), (b)(7)(C). Complainant agreed and on April 16, 2012, joined (b)(6), (b)(7)(C) in (b)(6), (b)(7)(C).

As of result of completing most of the command administrative duties, (b)(6), (b)(7)(C) detailed Complainant to work on (b)(6), (b)(7)(C) from June 4 to September 14, 2012. During the detail, Complainant provided (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

On September 14, 2012, (b)(6), (b)(7)(C) administered Complainant a memorandum ending the detail, and directed he resume working (b)(6), (b)(7)(C). On November 1, 2012, Complainant was reassigned to (b)(6), (b)(7)(C).

*Proposed Disciplinary Action - Yes*

On December 20, 2012, (b)(6), (b)(7)(C) emailed (b)(6), (b)(7)(C) a copy of an August 21, 2012, time and attendance CDI, and proposed disciplinary action against Complainant in the form of a reprimand.

On March 8, 2013, (b)(6), (b)(7)(C), as proposing official, directed (b)(6), (b)(7)(C) to “prepare and process” disciplinary action for Complainant. Specifically, he directed that Complainant receive a reprimand.

**C. Could Complainant’s protected disclosures or cooperation with the Inspector General of an agency have been a contributing factor in the agency’s decision to take, not take, threaten to take, or threaten not to take the personnel actions? Yes.**

*RMO Actual and Imputed Knowledge*

A preponderance of evidence established RDML Losey had knowledge and (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had imputed knowledge of Complainant’s first two protected disclosures (July and November 2011 IG complaints) and protected cooperation with DoD IG (February 2012) prior to administering Complainant’s first personnel action (September 2012 lowered annual performance evaluation). A preponderance of the evidence further established (b)(6), (b)(7)(C) had knowledge of Complainant’s communication to DoD Hotline (September 2012) prior to proposal of Complainant’s disciplinary action. Thus, the RMOs’ actual and imputed knowledge of the disclosures and cooperation prior to the personnel actions demonstrated the disclosures could have been a contributing factor in the personnel actions.

*July 13, 2011, DoD Hotline Complaint*

RDML Losey testified he was contacted by the Naval IG in late September 2011 notifying him of the anonymous complaint regarding (b)(6), (b)(7)(C).

(b)(6), (b)(7)(C) testified he learned of the complaint in October 2011 when RDML Losey told him somebody had submitted an IG complaint alleging (b)(6), (b)(7)(C).

<sup>4</sup> Although (b)(6), (b)(7)(C) detail of Complainant to (b)(6), (b)(7)(C) constituted a personnel action, the detail was not alleged as reprisal, and WRI saw no credible basis on which to open an investigation and analyze it further.

(b)(6), (b)(7)(C) stated that approximately December 2011, RDML Losey told him about the IG complaint and that sometime in 2012, RDML Losey referred to a group of SOCAFRICA civilians, including Complainant, (b)(6), (b)(7)(C), as “... somebody within that group would probably be somebody that would do that complaint.”

A preponderance of the evidence established RDML Losey suspected Complainant of making this protected disclosure. Further, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had knowledge RDML Losey suspected Complainant of making the July 2011 IG complaint. Accordingly, where RDML Losey influenced their personnel actions, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had imputed knowledge of Complainant’s perceived protected disclosure.

*November 17, 2011, AFRICOM IG Complaint*

RDML Losey had knowledge of the November 2011 IG complaint. On November 17, 2011, AFRICOM IG sent an email to RDML Losey notifying him they received an anonymous complaint that the climate in SOCAFRICA was at a toxic level. He suspected a group of civilians, including Complainant, of making the November 17, 2011, AFRICOM IG complaint.

(b)(6), (b)(7)(C) testified he gained knowledge of the complaint from RDML Losey around December 2011, but he also testified he (b)(6), (b)(7)(C) did not attribute it to Complainant. (b)(6), (b)(7)(C) testified he had knowledge of the complaint in November 2012.

A preponderance of the evidence indicates that RDML Losey was trying to determine who among the civilians he suspected made the complaint. Further, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had knowledge RDML Losey suspected Complainant of making the November 2011 IG complaint. Accordingly, where RDML Losey influenced their personnel actions, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had imputed knowledge of Complainant’s perceived protected disclosure.

*February 22, 2012, Cooperation with DoD IG (b)(6), (b)(7)(C)*

RDML Losey provided testimony on February 21, 2012, (b)(6), (b)(7)(C) in the DoD IG investigation of (b)(6), (b)(7)(C). RDML Losey testified to knowledge that Complainant and (b)(6), (b)(7)(C) participated in the DoD IG investigation of (b)(6), (b)(7)(C).

(b)(6), (b)(7)(C) testified he had knowledge of the February 2012 DoD IG investigation but had no knowledge DoD IG interviewed Complainant.

(b)(6), (b)(7)(C) testified he had no knowledge Complainant provided testimony to DoD IG in the investigation of (b)(6), (b)(7)(C).

A preponderance of evidence established RMDL Losey’s knowledge of Complainant’s cooperation with DoD IG. Accordingly, where RDML Losey influenced their personnel actions, (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) had imputed knowledge of Complainant’s cooperation with DoD IG.

*September 23, 2012, Communication to DoD Hotline*

On September 23, 2012, Complainant filed a DoD Hotline complaint alleging RDML Losey and (b)(6), (b)(7)(C) took or directed personnel actions in reprisal for perceived and actual disclosures. On October 22, 2012, the Deputy Inspector General, Administrative Investigations (DIG-AI) notified RDML Losey that he was under investigation for allegations of whistleblower reprisal against Complainant. RDML Losey testified he may have had knowledge of this protected disclosure a few weeks prior to DIG-AI notification.

(b)(6), (b)(7)(C) testified he first learned of this protected disclosure on December 11, 2012, when interviewed by DoD IG investigators.

(b)(6), (b)(7)(C) testified he first learned of this protected disclosure when contacted by DoD IG investigators on or about November 5, 2012.

A preponderance of the evidence established RDML Losey, (b)(6), (b)(7)(C), and (b)(6), (b)(7)(C) had knowledge of this protective disclosure on or about October, December 11, and November 5, 2012, respectively.

*Timing between the IG complaints and personnel actions*

Complainant's first disclosure (i.e., July 2011 anonymous IG complaint) and Complainant's last protected disclosure (i.e., September 23, 2012, DoD IG Hotline disclosure) occurred within a 14-month time frame. RDML Losey, (b)(6), (b)(7)(C), and (b)(6), (b)(7)(C) had actual or imputed knowledge of Complainant's first protected disclosure in late September 2011, Complainant's second protected disclosure in November 2011, and Complainant's cooperation with DoD IG in February 2012, approximately 7-11 months prior to administering Complainant's first personnel action (the September 2012 lowered annual performance evaluation). The RMOs administered the remaining personnel actions throughout the rest of 2012, culminating 6 months later (March 2013) when (b)(6), (b)(7)(C) proposed disciplinary action against Complainant. Accordingly, the timing of the personnel actions would lead a reasonable person to believe that Complainant's disclosures could be a contributing factor in the RMOs' decisions to take the personnel actions.

**D.1. Does clear and convincing evidence indicate that the same actions would have been taken against Complainant absent the perceived protected disclosures? No**

Once a preponderance of the evidence establishes that one or more protected disclosures could have contributed to the decision to take a personnel action, the case is substantiated unless clear and convincing evidence establishes that the personnel action would have been taken even in the absence of the protected disclosure. However, when it is a protected activity rather than disclosure—in this case, cooperating with an IG—that could have contributed to a personnel action, the case is substantiated unless a preponderance of evidence establishes that the action would have been taken absent the protected activity. We substantiated the instant mixed case based on the clear and convincing standard as applied to the protected disclosures. Given that

we substantiated reprisal for the protected disclosures, we did not find it necessary to analyze whether the actions were also taken in reprisal for the protected activity.

### *Lowered Annual Performance Evaluation*

On or about July 17, 2012, (b)(6), (b)(7)(C), as rater, administered Complainant a rating of “Excellence 75% or More Obj [Objective]” for his draft performance evaluation. (b)(6), (b)(7)(C) then forwarded Complainant’s draft evaluation with recommended rating supporting comments to (b)(6), (b)(7)(C) for RDML Losey’s evaluation as senior rater. The performance evaluation listed Complainant’s position as (b)(6), (b)(7)(C). RDML Losey disagreed with (b)(6), (b)(7)(C) rating, and based upon advice from (b)(6), (b)(7)(C), removed (b)(6), (b)(7)(C) as rater and completed Complainant’s performance evaluation as both rater and senior rater. As rater, RDML Losey administered Complainant a rating of “Success All or Excellence,” two levels lower than (b)(6), (b)(7)(C) recommended rating, and administered Complainant a “Successful (3 block)” as senior rater for the civilian appraisal period June 22, 2011, to June 30, 2012.<sup>5</sup> On September 10, 2012, (b)(6), (b)(7)(C) presented Complainant his completed and signed annual performance evaluation.

On August 24, 2011, (b)(6), (b)(7)(C) provided Complainant an initial performance counseling, which RDML Losey initialed on August 30, 2011. On January 31, 2012, (b)(6), (b)(7)(C) provided Complainant a midpoint performance counseling, which RDML Losey initialed on April 13, 2012. Both performance counseling statements were positive. Further, according to Complainant, he received no feedback indicating a decline in his performance that would explain the lowered evaluation marks. Complainant testified that in July 2012, (b)(6), (b)(7)(C) told Complainant he would receive a marking of “Excellent” in all of his performance objectives and rating.

(b)(6), (b)(7)(C) testified he was Complainant’s rater for the civilian appraisal period June 22, 2011, through June 30, 2012, and that he rated Complainant “... as excellent, the top block, because he continued to do nothing but excellent work. [Complainant] excelled in all areas.”

(b)(6), (b)(7)(C) testified that (b)(6), (b)(7)(C), told him there was a disagreement between (b)(6), (b)(7)(C) and RDML Losey concerning Complainant’s 2012 performance evaluation. (b)(6), (b)(7)(C) recommended (b)(6), (b)(7)(C) and RDML Losey discuss their differences and come to a mutual agreement on the performance evaluation rating. However, (b)(6), (b)(7)(C) stated that if an agreement on the rating was not reached, RDML Losey could direct (b)(6), (b)(7)(C) to change his rating and subject (b)(6), (b)(7)(C) to disciplinary action should he not comply. Alternately, RDML Losey could become both the rater and senior rater. (b)(6), (b)(7)(C) testified SOCAFRICA accepted the guidance, and as (b)(6), (b)(7)(C) did not change his rating, RDML Losey became both rater and senior rater. (b)(6), (b)(7)(C) went on to say the guidance included a recommendation that RDML Losey present the appraisal to Complainant and explain “... down to the objective how he rated each individual objective and thus the overall rating ... because, again, of what happened with him taking over the process.” (b)(6), (b)(7)(C) testified his advice was not

<sup>5</sup> Complainant’s 2012 performance evaluation appraisal rating was two levels below what he received in 2011.

followed as Complainant received a copy of his appraisal from (b)(6), (b)(7)(C), a person who was neither his rater nor senior rater. (b)(6), (b)(7)(C) stated he believed this was totally inappropriate as (b)(6), (b)(7)(C) was not Complainant's supervisor, had no involvement in Complainant's rating chain, nor was he familiar with Complainant's contributions to be able to explain the rationale behind the rating of each of Complainant's objectives.

(b)(6), (b)(7)(C) testified he asked (b)(6), (b)(7)(C) to approach RDML Losey to find out if he was willing to meet with (b)(6), (b)(7)(C) and discuss changing the ratings on Complainant's appraisal. (b)(6), (b)(7)(C) later told (b)(6), (b)(7)(C) that RDML Losey did not want to meet with (b)(6), (b)(7)(C) and did not want to change his ratings on Complainant's appraisal. (b)(6), (b)(7)(C) told (b)(6), (b)(7)(C) that his evaluation of Complainant's performance was accurate and that he was not inclined to change it.

(b)(6), (b)(7)(C) testified RDML Losey did not agree with (b)(6), (b)(7)(C) assessment and so he "... let me know right away that he didn't, he did not agree with that." With (b)(6), (b)(7)(C) guidance on overcoming a ratings impasse, (b)(6), (b)(7)(C) testified he and RDML Losey discussed directing (b)(6), (b)(7)(C) to change his rating, but RDML Losey stated, "I don't want to direct (b)(6), (b)(7)(C), or that's going to cause us to have a problem, a complaint." (b)(6), (b)(7)(C) testified he had never seen a counseling statement from RDML Losey to [Complainant] indicating that he had problems with his performance.

#### *RMO Stated Reasons*

RDML Losey testified that (b)(6), (b)(7)(C) was Complainant's initial rater who wanted to award Complainant an "Excellence" marking, the highest rating possible. RDML Losey disagreed with (b)(6), (b)(7)(C) proposed rating and consulted with (b)(6), (b)(7)(C), determining he could act as both rater and senior rater for Complainant. RDML Losey determined the marks he awarded reflected his view of Complainant's performance. When asked what he used as a metric to rate Complainant's performance, RDML Losey testified:

Work performance, specifically in this regard ... the special detail, (b)(6), (b)(7)(C), where those had gone, and then prior to that his functions as (b)(6), (b)(7)(C), the fact that I had to ask three or four times to get the body of correspondence of things that I had signed out ... and even then it wasn't complete ... the fact that (b)(6), (b)(7)(C). And I don't hold him accountable for that, but it was happening right in (b)(6), (b)(7)(C) ...

The performance evaluation period concluded 78 days after RDML Losey provided Complainant positive counseling. WRI found RDML Losey failed to put Complainant on a performance improvement plan (PIP). Without any documented negative (verbal or otherwise) performance feedback during the appraisal period, putting Complainant on notice that his performance was in decline, WRI found the Agency produced insufficient evidence to support the performance evaluation rating.

*Motive*

The evidence established RDML Losey believed (b)(6), (b)(7)(C) civilian employees in his command acted in concert to undermine his authority, in part by making IG complaints against him. RDML Losey referred to these civilian employees as either the “locker-room,” (b)(6), (b)(7)(C) or “the cabal.” When RDML Losey was asked if he ever used the terms “locker room,” “old guard,” “cabal,” or (b)(6), (b)(7)(C) to any particular group, he stated:

No, absolutely not. ... I’ve got to tell you, I don’t even know who, what that, who’s in those groups, if there is such a thing. You know, the cabal. You know, (b)(6), (b)(7)(C) I have no idea. I mean, I know (b)(6), (b)(7)(C) is, (b)(6), (b)(7)(C). I know (b)(6), (b)(7)(C) is. Beyond that, I’m not real sure.

When asked about the term (b)(6), (b)(7)(C) RDML Losey stated that (b)(6), (b)(7)(C) used the term.

(b)(6), (b)(7)(C) testified he used the term “cabal” to describe “a dynamic of folks out for their own self-interest ... (b)(6), (b)(7)(C), [Complainant], (b)(6), (b)(7)(C) ” (b)(6), (b)(7)(C) stated (b)(6), (b)(7)(C) coined the (b)(6), (b)(7)(C) term, that it was a pejorative term describing a group limited to “... [Complainant], (b)(6), (b)(7)(C), mainly,” and that he used the term (b)(6), (b)(7)(C) with (b)(6), (b)(7)(C).

(b)(6), (b)(7)(C) testimony corroborated (b)(6), (b)(7)(C) account that (b)(6), (b)(7)(C) coined the term (b)(6), (b)(7)(C) and of RDML Losey’s use of (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) stated, “... the Admiral, you know, [said] it has a little ring to it, and so the Admiral had said that a couple of times.” (b)(6), (b)(7)(C) stated:

RDML Losey at times, when he was, you know, out of sorts, would refer to a group of civilians as ‘the cabal,’ was the term that he used most of the time around me when I heard it. Of course, he wouldn’t say this in the hallway or anything. He would say it when we were in private, as far as the command team ... And I took that to mean that that was the (b)(6), (b)(7)(C) ... when the commander [RDML Losey] used the term (b)(6), (b)(7)(C) ... normally ‘the cabal’ ... he was talking about those people that would be talking to (b)(6), (b)(7)(C) on a regular basis and felt like that they shared information amongst people ... [Complainant], (b)(6), (b)(7)(C).

The evidence established RDML Losey, (b)(6), (b)(7)(C), and (b)(6), (b)(7)(C) used the term “cabal” to identify a group of civilians they believed to be out for their own self-interest and used a self-described pejorative term to identify Complainant. (b)(6), (b)(7)(C) testified he understood

“cabal” to mean (b)(6), (b)(7)(C). These two terms involved the same group of civilian employees, including Complainant, whom (b)(6), (b)(7)(C) identified as intent on undermining the SOCAFRICA command. The same three criteria RDML Losey communicated to Complainant in November 2011 identifying the people he suspected of a conspiracy (in part by making IG complaints) were also the same individuals in the “cabal” and (b)(6), (b)(7)(C).

RDML Losey suspected Complainant of making the July 2011 IG complaint alleging (b)(6), (b)(7)(C). RDML Losey also suspected Complainant of making the November 2011 AFRICOM IG complaint. (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) were influenced in their personnel actions as RMOs by RDML Losey who perceived Complainant made two IG complaints.

Accordingly, clear and convincing evidence does not establish that RDML Losey would have administered Complainant a “Success All or Excellence” as rater and a “Successful (3 block)” performance evaluation as senior rater absent Complainant’s perceived and protected disclosures.

#### *Denial of Performance Award*

On September 21, 2012, (b)(6), (b)(7)(C), as the awards approval authority, denied Complainant a performance award for the June 22, 2011, to June 30, 2012, appraisal period.

Complainant stated he speculated he did not receive an award because RDML Losey directed (b)(6), (b)(7)(C) to not give him an award.

(b)(6), (b)(7)(C) testified that he noted on Complainant’s appraisal what Complainant could receive in terms of a time-off award (based on the rating). According to (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) “... marked it out and said, ‘I will not approve an award for these individuals [Complainant and (b)(6), (b)(7)(C)].’ [(b)(6), (b)(7)(C)] did not give a reason.”

RDML Losey testified he saw no documentation about a proposed award to Complainant. RDML Losey recalled discussing Complainant’s award with (b)(6), (b)(7)(C) but did not provide him any specific direction.

(b)(6), (b)(7)(C) testified he believed (b)(6), (b)(7)(C) was not inclined to give Complainant a performance award, but he didn’t know the reasons why. When asked if (b)(6), (b)(7)(C) consulted with RDML Losey regarding his intent, (b)(6), (b)(7)(C) testified he assumed (b)(6), (b)(7)(C) had talked to RDML Losey about that “because we kept the Admiral informed of things.”

#### *RMO Stated Reasons*

(b)(6), (b)(7)(C) testified that awards were not entitlements. (b)(6), (b)(7)(C) went on to say he considered an 18-hour time-off award for Complainant but decided his work on (b)(6), (b)(7)(C) did not rate an award. (b)(6), (b)(7)(C) testified he may have had a conversation with RDML Losey, who questioned him what his rationale would be for giving him an award, but it all came back to “this (b)(6), (b)(7)(C) had been neglected for three years ....”

### *Motive*

(b)(6), (b)(7)(C), as an RMO, was influenced in denying Complainant's performance award by RDML Losey, who believed Complainant was attempting to undermine his command in part by filing IG complaints about him and about SOCAFRICA, and for his knowledge, Complainant cooperated in the DoD IG investigation of (b)(6), (b)(7)(C).

Accordingly, clear and convincing evidence does not establish that (b)(6), (b)(7)(C) would have denied Complainant a performance award absent Complainant's perceived and protected disclosures.

### *Reassignment*

On May 11, 2009, (b)(6), (b)(7)(C) became Complainant's rater and on June 21, 2011, RDML Losey became Complainant's senior rater. In September 2011, Complainant and (b)(6), (b)(7)(C) met with RDML Losey to discuss Complainant moving to (b)(6), (b)(7)(C). According to Complainant, RDML Losey wanted to keep Complainant around for the first year but might reconsider after the first of the year.

On January 16, 2012, (b)(6), (b)(7)(C), at the direction of RDML Losey, told Complainant he would be reassigned to (b)(6), (b)(7)(C) within 2 weeks. However, SOCAFRICA could not find Complainant's replacement until (b)(6), (b)(7)(C), delaying Complainant's move. During the first week of April 2012, as Complainant was preparing for transition to (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) asked him to assist (b)(6), (b)(7)(C) with (b)(6), (b)(7)(C) in lieu of moving immediately to (b)(6), (b)(7)(C). Complainant agreed and on April 16, 2012, joined (b)(6), (b)(7)(C) in (b)(6), (b)(7)(C).

According to (b)(6), (b)(7)(C), as of result of completing most of (b)(6), (b)(7)(C), he detailed Complainant to work on (b)(6), (b)(7)(C) from June 4 to September 14, 2012. According to Complainant, during this time he (b)(6), (b)(7)(C).

On September 14, 2012, (b)(6), (b)(7)(C) administered Complainant a memorandum ending the detail and directing he resume (b)(6), (b)(7)(C). On November 1, 2012, (b)(6), (b)(7)(C), at the direction of RDML Losey, reassigned Complainant to (b)(6), (b)(7)(C).

According to Complainant, prior to RDML Losey assuming SOCAFRICA command, he and (b)(6), (b)(7)(C) shared a discussion about (b)(6), (b)(7)(C), and that (b)(6), (b)(7)(C) wanted to move Complainant to (b)(6), (b)(7)(C). According to Complainant, once RDML Losey took command, he and (b)(6), (b)(7)(C) discussed moving Complainant with RDML Losey, but RDML Losey wasn't supportive of a move at that time.

Complainant believed that a notification on January 13, 2012, to RDML Losey that he was under investigation for whistleblower reprisal resulted in Complainant being told on January 16, 2012, that he was moving to (b)(6), (b)(7)(C). However, WRI's sole notification to

RDML Losey that month occurred on January 18, 2012, when DIG-AI notified RDML Losey he was under investigation for allegations of whistleblower reprisal concerning (b)(6), (b)(7)(C).

Complainant testified he believed RDML Losey shared everything with (b)(6), (b)(7)(C) and although (b)(6), (b)(7)(C) notified Complainant of the reassignment, Complainant believed (b)(6), (b)(7)(C) would only follow RDML Losey's directive. Complainant testified (b)(6), (b)(7)(C) would absolutely not stand up against RDML Losey.

(b)(6), (b)(7)(C) testified that (b)(6), (b)(7)(C) went on to say that when RDML Losey removed Complainant from his position with the intention of moving him to (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) told Complainant, "Well, you know, that is — at least that is positive ... you are moving out from direct supervision of RDML Losey into a position as (b)(6), (b)(7)(C)." "

According to (b)(6), (b)(7)(C), prior to January 17, 2012, he discussed with (b)(6), (b)(7)(C) his receptivity to accepting Complainant into (b)(6), (b)(7)(C). (b)(6), (b)(7)(C) testified he was favorably disposed to it.

When asked who decided to move Complainant, (b)(6), (b)(7)(C) testified, "Well, RDML Losey discussed it with me, indicating that it was on [Complainant's] request. And at that point COL Franck and I indicated that we needed to identify a suitable substitute ...."

#### *RMO Stated Reasons*

According to (b)(6), (b)(7)(C), when he was (b)(6), (b)(7)(C), Complainant would come to his office and express a desire to work in (b)(6), (b)(7)(C). When asked who made the decision [to reassign Complainant], (b)(6), (b)(7)(C) testified he decided (b)(6), (b)(7)(C), that RDML Losey knew (b)(6), (b)(7)(C) was intending it, and that RDML Losey supported Complainant going to (b)(6), (b)(7)(C). (b)(6), (b)(7)(C) recalled speaking to Complainant in January 2012 about the reassignment, that it was positive thing, and that Complainant had always wanted to do that. (b)(6), (b)(7)(C) went on to say that Complainant was happy about that.

RDML Losey testified that Complainant requested to move to (b)(6), (b)(7)(C), that he had two conversations with him about that topic, and that it was his intent to do that. About the reassignment RDML Losey testified, "[Complainant] asked — we gave him what he wanted."

WRI found Complainant wanted to move out of (b)(6), (b)(7)(C) and communicated to both (b)(6), (b)(7)(C) and RDML Losey his desire to move to (b)(6), (b)(7)(C). SOCAFRICA spent from January to April 2012, identifying a suitable replacement for Complainant. Before Complainant moved to (b)(6), (b)(7)(C), (b)(6), (b)(7)(C) assigned him (b)(6), (b)(7)(C) expressly outlined in (b)(6), (b)(7)(C), and Complainant agreed to assist (b)(6), (b)(7)(C) with those tasks. Although Complainant was detailed by (b)(6), (b)(7)(C) to complete (b)(6), (b)(7)(C) during the summer of 2012, he had not been officially reassigned to (b)(6), (b)(7)(C) at that time. RDML Losey and (b)(6), (b)(7)(C) determined they still needed Complainant to perform (b)(6), (b)(7)(C).

(b)(6), (b)(7)(C) and in November 2012 when RDML Losey determined those duties were complete, he reassigned Complainant to (b)(6), (b)(7)(C).

RDML Losey had direct knowledge and (b)(6), (b)(7)(C) had imputed knowledge of Complainant's perceived protected disclosures of August and November 2011. Although their knowledge of the disclosures could have been a contributing factor in their decision to reassign Complainant, WRI found RDML Losey and (b)(6), (b)(7)(C) produced sufficient evidence to demonstrate their knowledge of the disclosures was not a contributing factor in the decision to reassign Complainant.

Accordingly, clear and convincing evidence established that RDML Losey and COL Franck would have reassigned Complainant absent his perceived protected disclosures.

### *Proposed Disciplinary Action*

On August 21, 2012, RDML Losey appointed (b)(6), (b)(7)(C), SOCAFRICA, as IO to conduct a CDI pursuant to Army Regulation (AR) 15-6. The scope of the CDI was to investigate SOCAFRICA civilian pay system irregularities from January 1, 2010, to August 21, 2012. On December 13, 2012, (b)(6), (b)(7)(C) transmitted his findings and recommendations to RDML Losey. Finding 2 of the CDI found that Complainant violated the intent of ACSOI 1400.02, DoD FMR, and AFRICOM Policy Directives. (b)(6), (b)(7)(C) recommended Complainant receive a verbal counseling session, and RDML Losey approved the findings and recommendation, which served as the basis for later proposed disciplinary actions by (b)(6), (b)(7)(C).

WRI reviewed the CDI and identified problems with the thoroughness and scope of investigation. Specifically, the scope of the CDI was the SOCAFRICA civilian pay system, but evidence indicated (b)(6), (b)(7)(C) focused on reviewing the time and attendance of Complainant, (b)(6), (b)(7)(C). (b)(6), (b)(7)(C) testified that he reviewed time and attendance records for a large number of SOCAFRICA employees. (b)(6), (b)(7)(C) stated that (b)(6), (b)(7)(C) only requested the timekeeping records for the four individuals. (b)(6), (b)(7)(C) corroborated (b)(6), (b)(7)(C) statement and testified that (b)(6), (b)(7)(C) only requested time and attendance records concerning (b)(6), (b)(7)(C), Complainant, (b)(6), (b)(7)(C), and that he believed the CDI was investigating only them for time and attendance violations. (b)(6), (b)(7)(C) did not conduct any subject or witness interviews for the CDI.

The CDI findings disclosed disparities with out-of-sequence ATAAPS certifications and identified those certifications actions as misconduct by Complainant, (b)(6), (b)(7)(C). However, data from an October 2012 AFRICOM IG inspection that covered the period October 2011- October 2012 identified out-of-sequence certifications had occurred throughout SOCAFRICA and were not limited to just Complainant and three other employees as reflected in the CDI findings. The AFRICOM IG inspection data identified improperly built organizational hierarchies within ATAAPS as a root problem for out-of-sequence certifications.

While on its face RDML Losey's appointment was for a CDI into SOCAFRICA's civilian pay system irregularities, in fact, (b)(6), (b)(7)(C) focused his examination on alleged time and attendance misconduct by Complainant, (b)(6), (b)(7)(C). In spite of the apparent discrepancy between the broad CDI scope as appointed and the narrowed scope of the actual CDI report as conducted, RDML Losey did not return the CDI for further investigation consistent with the language of the appointment but instead approved the CDI as submitted.

On December 20, 2012, (b)(6), (b)(7)(C) emailed (b)(6), (b)(7)(C) a copy of the August 21, 2012, time and attendance CDI. (b)(6), (b)(7)(C) proposed disciplinary action against Complainant, specifically, that he receive at least a reprimand.

On March 8, 2013, (b)(6), (b)(7)(C), as proposing official, directed (b)(6), (b)(7)(C) to "prepare and process" disciplinary action for Complainant, (b)(6), (b)(7)(C). Specifically, he directed that Complainant receive a reprimand and that (b)(6), (b)(7)(C) receive a 14-day suspension and reprimand.

#### *RMO Stated Reasons*

(b)(6), (b)(7)(C) testified that he recommended to CPAC that Complainant should receive a reprimand. (b)(6), (b)(7)(C) testified he and (b)(6), (b)(7)(C) (SOCAFRICA), reviewed the evidence subsequent to his initiation of the action with CPAC. (b)(6), (b)(7)(C) testified CPAC concurred that the evidence he provided them supported a reprimand. Several months later, according to (b)(6), (b)(7)(C), he submitted a final request to CPAC to "... move forward. In other words, send the draft memos to the AFRICOM legal counsel ... to get the legal review." (b)(6), (b)(7)(C) testified that [Complainant] was one of a handful of individuals who was a habitual abuser of the time and attendance process.

WRI found that an AFRICOM legal review of (b)(6), (b)(7)(C), (b)(5)

The AFRICOM legal review of (b)(6), (b)(7)(C), (b)(5)

Although AFRICOM did not provide a legal review of (b)(6), (b)(7)(C), (b)(5) (b)(6), (b)(7)(C), (b)(5) (b)(6), (b)(7)(C) relied on the same body of evidence (b)(6), (b)(7)(C), (b)(5) to support Complainant's proposed reprimand that an AFRICOM legal review (b)(6), (b)(7)(C), (b)(5)

#### *Motive*

(b)(6), (b)(7)(C) was influenced as an RMO in proposing disciplinary action against Complainant by RDML Losey, who believed Complainant was attempting to undermine his command in part by filing IG complaints about him and about SOCAFRICA, and for his knowledge Complainant cooperated in the DoD IG investigation of (b)(6), (b)(7)(C)

Accordingly, clear and convincing evidence does not establish that (b)(6), (b)(7)(C) would have proposed Complainant's disciplinary action absent Complainant's perceived and protected disclosures.

## VI. RMO RESPONSES TO THE TENTATIVE CONCLUSION

In his November 7, 2014, response to our preliminary report of investigation, RDML Losey stated that it was bizarre we substantiated the allegation he reassigned Complainant to a billet he requested. However, the tentative ROI we provided RDML Losey did not substantiate the allegation that RDML Losey reassigned Complainant. As stated above, we found RDML Losey produced sufficient evidence to demonstrate his knowledge of the disclosures was not a contributing factor in his decision to reassign Complainant.

RDML Losey stated Complainant's character was an undeniable credibility factor not discussed in the ROI. RDML Losey stated he provided DoD IG evidence documenting Complainant's character, and that further evidence of character was Complainant's ATAAPS abuse, and his unauthorized approval of the pay and leave benefits (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C) However, credibility assessments are inherent to every investigation, and this ROI reflects numerous credibility assessments done in light of existing relevant evidence throughout the investigative process. We reviewed witness testimony as it was supported by or inconsistent with other contemporaneous evidence. Additionally, the AFRICOM legal review (b)(6), (b)(7)(C), (b)(7)(C)

(b)(6), (b)(7)(C) determined the evidence (b)(6), (b)(7)(C), (b)(7)(C) Although AFRICOM did not provide a legal review of Complainant's proposed disciplinary action, the same body of evidence was used to support Complainant's proposed reprimand.

RDML Losey further asserted DoD IG substantiated reprisal despite significant and legitimate countervailing evidence that we diminished or suppressed. DoD IG did consider all of the evidence. However, once a preponderance of the evidence establishes that a protected disclosure could have contributed to the decision to take a personnel action, the burden of proof shifts to the RMO to provide clear and convincing evidence they would have taken the personnel action despite the protected disclosure. RDML Losey does not claim the standard of clear and convincing has been met.

In his November 18, 2014, response to our preliminary report of investigation, (b)(6), (b)(7)(C) acknowledged being aware of protected disclosures "by late Fall 2011," but that he did not suspect Complainant had filed a complaint until December 2012. However, as stated in the report, (b)(6), (b)(7)(C) had imputed knowledge of Complainant's first two protected disclosures (July and November 2011 IG complaints).

(b)(6), (b)(7)(C) stated that from his first day in SOCAFRICA, he was alarmed by the lack of staff initiative and absence of institutional processes expected in a functional organization, (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) stated that Complainant's failure (b)(6), (b)(7)(C) resulted in (b)(6), (b)(7)(C) inconsistent and insufficient recommendations for (b)(6), (b)(7)(C) decisions, and crafting ad-hoc processes (b)(6), (b)(7)(C)

(b) (6), (b) (7) . (b)(6), (b)(7)(C) went on to say Complainant’s personnel actions were a result of Complainant’s incompetence and misconduct. However, as stated in the report, (b)(6), (b)(7)(C) as rater provided Complainant positive initial and midpoint performance counselings, both endorsed by RDML Losey as senior rater. Neither rater nor senior rater provided Complainant any documented negative performance feedback during the appraisal period, nor did either rater put Complainant on a performance improvement plan to correct any of the deficiencies alleged by (b)(6), (b)(7)(C) in his response. (b)(6), (b)(7)(C) unequivocal claim that his motive was Complainant’s inability to fulfill his duties is not supported by evidence of appropriate action taken to address that inability.

(b)(6), (b)(7)(C) went on to say that Complainant’s annual appraisal reflected accordingly, and he therefore determined Complainant’s performance did not merit a performance award. However, the report found Complainant’s annual appraisal was administered in reprisal for his protected disclosures, and therefore is suspect as the basis for the performance award denial.

(b)(6), (b)(7)(C) stated that Complainant abused the time and attendance system (ATAAPS) and that an informal investigation revealed the abuse was not pervasive throughout the Command but limited to three civilians, including Complainant. However, as stated in the report, data from an October 2012 AFRICOM IG inspection identified out-of-sequence certifications had occurred throughout SOCAFRICA, and were not limited to just Complainant and three other employees as reflected in the ATAAPS CDI findings. The report further found in spite of the the broad CDI scope as appointed, the investigation focused on alleged time and attendance misconduct by four civilians including Complainant. An investigation of whistleblowers used to develop a basis to institute disciplinary action supports a finding of reprisal.

(b)(6), (b)(7)(C) stated that during the time Complainant assisted (b)(6), (b)(7)(C) in (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) without the knowledge of (b)(6), (b)(7)(C) of (b)(6), (b)(7)(C) (b)(6), (b)(7)(C). However, as stated in the report, Complainant was detailed to the position in (b)(6), (b)(7)(C) by his immediate supervisor, (b)(6), (b)(7)(C) . (b)(6), (b)(7)(C) contention that neither he nor (b)(6), (b)(7)(C) was aware of this action is misdirected, as Complainant did not separate himself (b)(6), (b)(7)(C) work, but was detailed to the position by his immediate supervisor, (b)(6), (b)(7)(C) .

Finally, (b)(6), (b)(7)(C) stated that Complainant disobeyed an order from the Commander (RDML Losey) (b)(6), (b)(7)(C)

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(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) assertion that  
 Complainant willfully disobeyed RDML Losey's direct order is not conclusively supported by  
 the evidence, especially in light of RDML Losey's testimony (b) (6), (b) (7)(C)

After carefully considering RDML Losey's and (b)(6), (b)(7)(C) responses to our tentative conclusion and their supplemental information, which did not provide any information that we had not considered, we stand by our conclusions.

## VII. CONCLUSIONS

We conclude:

A. RDML Losey, inconsistent with the principles of 5 U.S.C. 2302, administered Complainant a lowered performance evaluation in reprisal for perceiving Complainant to have made two anonymous IG complaints.

B. (b)(6), (b)(7)(C), inconsistent with the principles of 5 U.S.C. 2302, denied Complainant a performance award in reprisal for perceiving Complainant to have made two anonymous IG complaints.

C. RDML Losey and (b)(6), (b)(7)(C), not inconsistent with the principles of 5 U.S.C. 2302, did not reassign Complainant in reprisal for perceiving Complainant to have made two anonymous IG complaints.

D. (b)(6), (b)(7)(C), inconsistent with the principles of 5 U.S.C. 2302, proposed disciplinary action against Complainant in reprisal for perceiving Complainant to have made two anonymous IG complaints.

## VIII. RECOMMENDATIONS

We recommend the Secretary of the Navy take appropriate action against RDML Losey for reprising against Complainant.

We recommend the Secretary (b)(6), (b)(7)(C) take appropriate action against (b)(6), (b)(7)(C) for reprising against Complainant.

We recommend the Secretary (b)(6), (b)(7)(C) replace Complainant's 2012 annual performance evaluation with the rating supplied by his original rater and grant him the commensurate performance award for 2012.

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